Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 00-106
Review of Commission Consideration of Applications under the Cable Landing License Act	)	

REPLY
COMMENTS OF VIATEL, INC.

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Viatel, Inc. ("Viatel") hereby submits its reply to the comments filed in response to the Notice of Proposed Rule Making ("NPRM") released in this proceeding on June 22, 2000.[1]

Introduction

In its comments in this proceeding, Viatel strongly supported the Commission's goal of further streamlining the submarine cable landing license process. Viatel also proposed that this goal can best be achieved, not through the fact-intensive inquiries described in the NPRM's first two streamlining options, but by streamlining all applications that meet either of two criteria: first, all applications for cables as to which no owner is dominant for any cable landing region or route served by the cable; second, all applications as to which the applicant agrees to accept the following conditions:

(1) the applicant will provide sufficient space at all landing stations in the U.S., and at each foreign landing station on the route where applicants plan to land the proposed cable, to any other owner for the purpose of collocating equipment to provide backhaul;

(2) all owners may use such space for the provision by them of backhaul services to others;

[1] *Review of Commission Consideration of Applications under the Cable Landing License Act*, Notice of Proposed Rule Making, IB Docket No. 00-106 (June 22, 2000).

(3) if insufficient space exists at a landing station, the landing party may provide such space in a separate building adjacent to the landing station;

(4) there will be no restrictions on the ability of any owner to subcontract the provision of backhaul;

(5) space, connection facilities and necessary services must be provided promptly and without discrimination;

(6) the capacity of the cable may be upgraded either by a 51 percent vote of the owners or by any group of owners voting to fully fund the cost of the upgrade;

(7) there will be no restrictions on resale or transfer of capacity, resale by parties of their ownership shares or leasing of rights on the cable; and

(8) smaller firms will be allowed to combine their capacity requirements for the purpose of obtaining volume discounts.[2]

The comments in this proceeding confirm the appropriateness of Viatel's proposed standard. Like Viatel, most commenters support the Commission's goal of streamlining the licensing of undersea cables, and support the Commission's existing section 214 streamlining process as the most appropriate model for cable license streamlining. The comments also overwhelmingly agree that the Commission's proposed streamlining approach is so complex as to defeat the purpose of streamlining.[3] But regrettably, most of the commenters' proposed alternatives to the Commission's approach are equally complex or would streamline applications that present genuine competitive issues. Instead of these approaches, the Commission should adopt a streamlining standard that addresses competitive concerns without requiring the applicant to make a fact-intensive

[2] Comments of Viatel, Inc. at 10-11.

[3] Comments of AT&T Corp. and Its Affiliates Concert Global Networks USA L.L.C. and Concert Global Network Services Ltd. at 40-53 ("AT&T Comments"); Comments of Cable and Wireless USA, Inc. at 21 ("C&W USA Comments"); Comments of FLAG Telecom Holdings Ltd. at 2-3 ("FLAG Comments"); Comments of Global Crossing Ltd. at 12-13 ("GC Comments"); Comments of Sprint at 17-18.

demonstration.

I. The Commission Should Adopt The Streamlining Standard Proposed In Viatel's Comments

As the comments generally agree, almost all new submarine cables will increase capacity without posing any threat to competition. However, a minority of proposed cables - potentially including some that will serve WTO member countries - may present competitive issues that will justify the imposition of conditions. Where an application presents competitive issues that require a factual inquiry into the proposed cable's market impact, and where the applicant does not agree to be bound by pro-competitive conditions that moot those concerns, streamlined treatment should not be applied. At the same time, applications that do not present competitive issues, either because the owners of the proposed cable already have been found to be non-dominant for all relevant routes and regions, or because the cable will be subject to conditions that preclude harm to competition, should be granted on a streamlined basis without requiring the applicant to make complex, fact-specific demonstrations.

Some commenters' proposals would satisfy neither of these requirements. Specifically, some commenters would streamline all applications - or all applications for WTO routes - including those that present competitive issues. Others propose criteria for streamlining (based loosely on the NPRM's Options 1 and 2) that would require applicants to make lengthy and potentially contentious factual demonstrations. One commenter (Global Crossing) advocates standards, for consideration of both streamlined and nonstreamlined applications, that would restrict rather than promote competition. The Commission should reject these proposals as inconsistent with the public interest.

A. The Commission Should Not Automatically Streamline All Applications, Or All Applications For Cables That Will Serve WTO Routes

Some commenters favor streamlined treatment of all cable landing license applications, or all applications for licenses to land cables from WTO Member countries. AT&T, for example, argues that "the Commission should presumptively streamline all

submarine cable landing license applications" and should approve all such applications within 14 days of filing except those "that are not complete, and those very few applications that the Commission Staff identify as 'rais[ing] extraordinary issues suggesting a need for public comment.'"[4] Similarly, Sprint suggests that streamlining will be appropriate "even where a cable landing license applicant [is] a carrier affiliated with a foreign carrier possessing market power in a WTO member country" where the cable land[s].[5] And 360networks, Inc., argues for a presumption that all applications for the addition of a new cable will qualify for streamlined treatment.[6]

Adoption of these proposals would represent a substantial and unwarranted departure from the Commission's approach to streamlining. As the Commission made clear in its 1999 *Biennial Review Order*, streamlining is appropriate only where it is clear that "the applicant does not have an affiliation with a foreign carrier [in a destination market] or . . .the affiliated foreign carrier clearly lacks market power."[7] In such cases, as the Commission pointed out, streamlined treatment should be granted because "the possibility of leveraging foreign market power to harm competition in the United States is very unlikely."[8] In all other cases, however, the Commission requires that applications be put out for comment so that any competitive problems can be identified and fully considered.

When it applied this principle to the Section 214 process, the Commission decided to streamline applications for affiliated routes on which the foreign affiliate already had been found to lack market power, or on which the affiliate owned no facilities (except

[4] AT&T Comments at 38-39, quoting *1998 Biennial Review -- Review of International Common Carrier Regulations,* 14 FCC Rcd 4909, 4915-16 (1999) (*"Biennial Review Order"*).

[5] Comments of Sprint at 18-19.

[6] Comments of 360networks, Inc. at 3.

[7] *Biennial Review Order* at 4918.

[8] *Id.*

mobile wireless facilities) at the foreign end of the route, or where the affiliate had less than a 50 percent share in the international transport and local access markets in the destination country.[9] These criteria define those applications that present no genuine competitive issue, and on which public comment would serve no constructive purpose. The Commission did not, however, streamline the Section 214 process for all Section 214 applications, or even for all applications to serve WTO routes. Instead, the Commission preserved its ability, and that of interested parties, to scrutinize affiliations that might enable foreign carriers to engage in anti-competitive practices in destination markets.[10]

The Commission should follow a similar approach in this proceeding. As the Commission concluded in its *Foreign Participation Order*, cable landing license applications -- even for submarine cables from WTO Member countries - may pose "unusual risks to competition" that justify "imposing conditions on the license."[11] Automatic streamlining of all applications -- even if confined to cables that will operate between the United States and WTO countries -- may foreclose adequate consideration of these competitive issues and would not serve the public interest. Accordingly, rather than streamline all applications, even for WTO routes, the Commission should streamline only those applications that can be found, without a fact-intensive inquiry, to foreclose any realistic threat to competition. As Viatel discussed in its comments, those circumstances are presented when the owners of the proposed cable are non-dominant on the routes and in the regions the proposed cable will serve, or where the applicants agree to bound by certain procompetitive conditions in their operation of the proposed cable.

B. The Commission Should Not Adopt The Variants Of Its First And

[9] *Id.* at 4918-19.

[10] *Id.* For WTO routes, the Commission concluded that applications not otherwise eligible for streamlining would be streamlined only if the applicant certified that it would comply with dominant carrier regulation on the affiliated route. *Id.*

[11] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* 12 FCC Rcd 23891, 23934 (1997) (*"Foreign Participation Order"*).

Second Streamlining Options Proposed By Some Commenters

Some comments point out that the Commission's first and second streamlining options are excessively cumbersome and fact-specific, but propose modifications to those options that do not cure this defect. For example, AT&T suggests that if the Commission does not streamline all applications, it should adopt criteria that include a regional, rather than route-by-route, version of the Commission's "competitive route" option.[12] AT&T also urges that the "three independent cable" criterion of the competitive route option be replaced with "a well-reasoned competitive analysis" that takes into account the capacity available on existing consortium cables, the low barriers to entry in the marketplace and the availability of satellite-based transport.[13] AT&T's proposal, however, would make the competitive route analysis more rigorous by making it even more complex and fact-driven than the version of that option proposed in the NPRM. As Viatel pointed out in its comments, the option proposed in the NPRM already would require considerable research before an application even could be filed. That option also calls for data that might not be available, and invites disputes that could be resolved only through lengthy factual inquiry.[14] Because it would exacerbate, rather than reduce, these defects, AT&T's variant of the competitive route option should not be adopted.

FLAG Telecom Holdings Limited ("FLAG") expresses support for all three of the Commission's proposed streamlining options, including the competitive route and competitive capacity expansion options. Like AT&T, however, FLAG tempers its support with proposed modifications that do not make those options significantly less fact-intensive. Notably, FLAG urges a competitive route test that takes into account the availability of satellite capacity and includes cables deployed earlier than 36 months before the date of the

[12] AT&T Comments at 40-48.

[13] *Id.* at 46.

[14] Comments of Viatel, Inc. at 6.

application.[15] FLAG also urges that the key applicant group, for purposes of the competitive capacity expansion option, should include only "an entity that is the exclusive backhaul provider in a particular market or that exercises *de facto* control over either the entire wet link of the proposed cable or *all* landing stations on either end of a particular segment of the proposed cable," and should not include any entity that does not control all of the landing stations at the end of a route served by the proposed cable.[16] Unfortunately, FLAG's proposed streamlining options still would require fact-intensive inquiries that are inconsistent with streamlined processing.[17] Accordingly, the competitive route and competitive capacity expansion options should not be adopted, either in the form described in the NPRM or in the variants proposed by AT&T and FLAG.

C. The Commission Should Not Adopt The Self-Serving Standard Proposed By Global Crossing

Global Crossing proposes a complex analysis that, in its view, may be applied either to determine whether an application should be streamlined or to determine whether a nonstreamlined application should be granted. The Global Crossing approach is antithetical to any reasonable streamlining standard.

Most fundamentally, Global Crossing's comments continue its effort to secure the Commission's endorsement of - and regulatory assistance to - a particular business model for undersea cable operation. In support of that goal, Global Crossing again argues that consortium cables undermine competition because they: (1) permit dominant foreign carriers to "cluster" their U.S. carrier correspondents on cables in which they operate the landing stations; and (2) "foreclose" cables that compete against those in which the dominant foreign carriers have an ownership interest. Each of these claims relies upon

[15] FLAG Comments at 6-9.

[16] *Id.* at 9.

[17] As Viatel's comments point out, the Commission's competitive capacity expansion option requires an even more complex factual showing, and will invite even more contentious disputes, than the competitive route option. Comments of Viatel, Inc. at 7-8.

faulty logic and incorrect factual assumptions.[18]

Notably, as AT&T's comments point out, the supposed "clustering" tactic will succeed only if dominant foreign carriers refuse to enter into correspondent relationships with carriers that do not use cables on which the dominant carrier operates the landing station.[19] Correspondent relationships, however, affect only the diminishing percentage of active international submarine circuits that carry international message telephone service ("IMTS") circuits. With data traffic accounting for over 80 percent of such circuits today, and projected to account for over 90 percent of such circuits over the next five years, no foreign carrier can expect to exercise market power by denying U.S. carriers return minutes of traffic on IMTS circuits.[20]

Global Crossing's "foreclosure" theory is similarly flawed. According to this argument, a dominant foreign carrier will leverage its control over backhaul facilities in the destination market to force users of international cable capacity to use the cable in which that foreign carrier has an interest. As AT&T points out, however, this theory assumes the dominant carrier's complete control of all backhaul capacity in the destination market. Also, even in cases where the foreign carrier controlled all backhaul capacity, the dominant foreign carrier would have to have a larger interest in the cable than any dominant carrier has in any cable planned today, in order for the revenues lost by refusing to terminate traffic on that carrier's system to be offset by revenues earned by the cable in which the dominant carrier has an interest.[21]

Even if the Commission found some merit to Global Crossing's clustering and foreclosure theories, the solution proposed by Global Crossing is transparently anti-

[18] GC Comments at 3-9.

[19] AT&T Comments at 19.

[20] *Id.* at 21.

[21] *Id.* at 24-25.

competitive. To control the supposed anticompetitive incentives of consortium cables, Global Crossing proposes a "35 percent rule" that will do nothing to promote competition, but that will be of substantial benefit to Global Crossing. Specifically, Global Crossing's rule would force carriers with more than 35 percent of existing active half circuits on the U.S. side of a route to meet additional demand by leasing capacity from private cable operators like Global Crossing, rather than initiating or investing in new capacity provided by consortium cables. The Commission should reject this self-serving proposal.

Finally, the Commission also should reject Global Crossing's suggestion that the Commission make all cable landing licenses provisional by periodically revisiting licenses already granted to ascertain whether competitive conditions have changed.[22] As the Commission has pointed out, one important purpose of streamlining is to improve the clarity and certainty of the regulatory process.[23] Global Crossing's proposal would have the opposite effect, by making all of the Commission's decisions on cable landing license applications provisional and subject to reversal.

II. The Cable Landing License Streamlining Process Should Be Based On The Section 214 Streamlining Process

If the Commission adopts the streamlining standard proposed by Viatel, streamlined treatment will be extended only to cable landing license applications that present no colorable issues of adverse impact on competition. Under those circumstances, it is entirely appropriate for the Commission not to entertain oppositions to streamlined applications, and to undertake a factual inquiry only into those applications that the Commission Staff finds present extraordinary competitive issues. This is the approach the Commission took in the Section 214 streamlining process, and the same approach should be followed here.

III. The Commission Should Coordinate With The Executive Branch To Expedite The Licensing Process

[22] GC Comments at 18.

[23] *NPRM* at ¶ 3.

The Commission should make every effort to coordinate and expedite Executive Branch review of cable landing license applications. However, adoption of the Caribbean Crossing proposal, under which the Commission would give the State Department a 30-day deadline to complete its review, likely would exceed the Commission's statutory authority.[24] In this respect, Caribbean Crossing's reliance on the Hart-Scott-Rodino process, which is based on express provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, is misplaced.[25] Unlike Hart-Scott-Rodino, the Cable Landing License Act and Executive Order No. 10530 do not create a fixed period of time after which an application will be deemed approved in the absence of agency or Executive Branch action.[26] In the absence of a statutory deadline, the Commission cannot compel action by the Executive or act before the Executive's prerogative to review an application under the Cable Landing License Act has been exercised.

Conclusion

The Commission should streamline all applications that can be shown, without fact-intensive market analysis, to pose no competitive issues. The record of this proceeding confirms that that goal can best be served if streamlined treatment is granted to: (1) all applications to serve routes on which no owner of the proposed cable is dominant in a region or on a route served by the cable; and (2) all applicants that agree to abide by the pro-competitive conditions described in Viatel's comments.

[24] Comments of Caribbean Crossings, Ltd. at 2-3.

[25] Pub. L. No. 94-435, 90 Stat. 1383.

[26] 47 U.S.C. §§ 34-39; Exec. Ord. No. 10530, § 5(a), reprinted as amended in 3 U.S.C. § 301 (1994).

Respectfully submitted,

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Dated: September 20, 2000

CERTIFICATE OF SERVICE

I, James S. Bucholz, do hereby certify that the foregoing **Reply Comments** were delivered, by electronic mail, this 20th day of September, 2000, to the following:

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